2015 LSBC 26
Decision issued: June 5, 2015
Citation issued: May 29, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

LEONIDES TUNGOHAN

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	April 17, 2015
Panel:	Miriam Kresivo, QC, Chair Bruce LeRose, QC, Lawyer Lois Serwa, Public representative
Discipline Counsel:	Alison Kirby
Appearing on his own behalf:	Leonides Tungohan

INTRODUCTION

[1] On January 14, 2015 this Panel issued its decision on Facts and Determination against the Respondent (the "Decision"), 2015 LSBC 02. The citation issued May 29, 2013 contained five allegations of misconduct against the Respondent, most relating to the withdrawal of funds from trust. Specifically, the Panel found that the Respondent had:

1. between October 2009 and March 2010, received trust funds totaling $19,250 (the "Funds") from his client RG in a real estate litigation matter and failed to handle the Funds in accordance with Division 7 of Part 3 of the Law Society Rules;

2. failed to notify the Executive Director of the Law Society in writing of the circumstances of a judgment in the amount of $18,627.03 granted against him on April 18, 2011 in British Columbia Supreme Court and his proposal for satisfying such judgment, contrary to Rule 3-44 of the Law Society Rules;

3. between December 2009 and May 2011, withdrawn trust funds purportedly in payment of his fees from his pooled trust account without first preparing a bill and immediately delivering the bill to his clients, contrary to Rule 3-56 and Rule 3-57(2) of the Law Society Rules;

4. between December 1, 2009 and December 31, 2010, failed to maintain books, accounts and records in accordance with Division 7 of Part 3 of the Law Society Rules;

5. between December 1, 2009 and December 31, 2009, made payments from trust funds when his trust accounting records were not current, contrary to Rule 3-56(1.2) of the Law Society Rules.

This Panel determined that all five allegations of misconduct had been proven and that the conduct constituted professional misconduct.

DETERMINATION OF THE APPROPRIATE SANCTION

[2] The Law Society submits that the appropriate disciplinary action is a fine in the range of $5,000 to $10,000; and that the following conditions be imposed on the Respondent's practice:

(a) an order that the Respondent practise law only as an employee of one or more lawyers and on terms as may be approved in writing by the Practice Standards Committee, until the Practice Standards Committee relieves him of this condition;

(b) an order that, if the Respondent's employment is terminated, he must immediately notify the Practice Standards Committee and immediately cease practising law until such time as the Practice Standards Committee has authorized him in writing to accept another employment situation;

(c) an order that the Respondent must not handle any trust transactions or trust money, or in any way be responsible for documenting trust transactions until the Practice Standards Committee relieves him of this condition; and

(d) an order that the Respondent must not be responsible for any bookkeeping or financial record keeping in connection with client files until the Practice Standards Committee relieves him of this condition.

[3] The Law Society also seeks costs in the amount of $29,736.53 in accordance with the tariff.

[4] The Respondent submits that the proposed sanction is inappropriate, punitive, gratuitous and speculative. He states that costs should be significantly less and should not be looked at in isolation of the penalty.

PURPOSE OF DISCIPLINE

[5] We accept that the primary purpose of disciplinary proceedings is set out in *Law Society of BC v. Hordal,* 2004 LSBC 36 and *Law Society of BC v. Hill* 2011 LSBC 16. The panel in *Hill* stated at paragraph 3:

> It is neither our function nor our purpose to punish anyone. The primary object of proceedings such as these is to discharge the Law Society's statutory obligation, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice. Our task is to decide upon a sanction or sanctions that, in our opinion, is best calculated to protect the public, maintain high professional standards and preserve public confidence in the legal profession.

[6] This is reflected in MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, Carswell, 1993 at page 26-1.

[7] Clearly, the purpose of Law Society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession. We must keep that in mind when determining the appropriate sanction.

GENERAL PRINCIPLES OF APPROPRIATE DISCIPLINE

[8] In *Law Society of BC v. Ogilvie*, [1999] LSBC 17, the panel set out some appropriate factors to consider in determining appropriate discipline. These factors were also considered by the panel in *Law Society of BC v. Lessing*, 2013 LSBC 29, who indicated that not all the factors set out in *Ogilvie* would be considered in all cases. However, the panel indicated that two factors will play an important role in almost every case – the protection of the public and the rehabilitation of the

respondent. As the panel stated in *Lessing*, when considering the two possibly competing factors:

> ... The first is the protection of the public, including public confidence in the disciplinary process and public confidence in the profession generally. The second factor is the rehabilitation of the member.
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> ...
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> Undoubtedly, if there is a conflict between these two factors, then protection of the public will prevail. ...

[9] We will review the factors set out in *Ogilvie*:

Nature and gravity of the conduct proven

[10] The conduct of the Respondent is a concern since it related to the failure to properly handle trust funds and the failure to maintain books, accounts and records appropriately.

[11] There are numerous breaches relating to the handling of money in the Respondent's trust and general account. Generally, the breaches relate to the improper withdrawal of money from trust or failing to pay money into trust when services had been rendered to the client but no bill for services had been rendered. The Respondent failed to properly bill for the services that he rendered to clients prior to paying money out of his trust account or failed to deposit money into the trust account at all. There were no allegations that the Respondent received more money than he was entitled to or received any other benefit. The Respondent also failed to maintain appropriate accounting records.

[12] The concern of the Panel is that the Respondent throughout the hearing did not appear to understand his obligations under Part 3, Division 7 of the Rules, and particularly, failed to understand that he could not take client funds without properly billing the client, notwithstanding the fact that he had completed all the work that represented the amount taken. He also did not appear to understand the difference between a retainer letter and a bill for services.

[13] Compliance with trust accounting rules are key to the protection of the public. The public must be able to rely on a lawyer handling trust funds appropriately. Compliance with Part 3, Division 7 trust accounting rules is required to maintain the confidence of the public in the trustworthiness of the legal profession. Any

failure, even failures relating to small amounts, undermines the integrity of the lawyer and the legal profession as a whole.

The age and experience of the respondent

[14] All of the misconduct relates to the Respondent's first year of practice as a sole practitioner running his own practice. The Respondent did not hire a bookkeeper, and his accountant used the Simply Accounting package, which is not specifically designed to deal with law practices.

[15] There was no evidence before the Panel of misconduct after 2010. The Law Society has advised that it has a full audit of the Respondent's practice scheduled in August of 2015.

The previous character of the respondent, including details of prior discipline

[16] The Respondent has one prior conduct review authorized on September 8, 2011. The Respondent was required to appear before a Conduct Review Subcommittee to discuss his conduct during a summary trial application in which he made submissions to the court that called into question the integrity of opposing counsel, suggesting that opposing counsel was misleading the court and may have been in contempt.

The impact upon the victim

[17] In this case, one of the clients, RG, provided a letter describing the impact on her. In this letter RG focuses primarily on the alleged incompetence of the Respondent in handling her case. There is little related to billing and handling of trust funds, although RG does review the concern regarding the payment of the judgment relating to legal fees.

The advantage gained or to be gained by the respondent

[18] The Law Society alleges that the Respondent was able to use the trust funds sooner than he would have otherwise if he had taken the time to prepare and deliver a bill. In our view, there was little to no advantage to the Respondent. The issue here was not attempting to gain access to the funds earlier than entitlement. The Respondent had completed the work. He failed to comply with the rules of accounting to properly access the monies.

The number of times the offending conduct occurred

[19] There are numerous instances in which the Respondent failed to bill his clients properly prior to removing money from his trust or general account. The Respondent failed to record trust and general transactions properly over the course of approximately one year. The accounting problems were discovered by the Law Society in an audit, and the Respondent took measures to change his accounting system.

Whether the respondent has acknowledged the misconduct and taken steps to redress the wrong and the presence or absence of other mitigating circumstances

[20] The Respondent has not acknowledged the misconduct. The Respondent submitted to this Panel that he had a reasonable basis to hold the view that he had not breached the trust accounting rules. While that may be reasonable at the hearing on facts and determination, he continued to express those views at this phase of the hearing, determining disciplinary action. He did indicate he would change his billing practices, in order to "play safe." He still did not understand or acknowledge the concern of the Panel or understand that his actions were contrary to the rules.

The possibility of remediation or rehabilitation of the respondent

[21] The Panel is concerned that the Respondent does not appear to comprehend that he must send a bill to his client before he is entitled to the retainer funds, regardless of whether he has already rendered services to his client. He does not appear to understand the difference between a bill and a retainer agreement.

[22] However, we are advised by the Law Society that, since this matter arose, the Respondent hired a bookkeeper and an accountant who used an accounting program designed for law firms and was required to provide an accountant's report on his trust account. The Respondent is not required to file an accountant's report for his trust account in 2015 because the Law Society will conduct a full audit in August 2015. During the hearing the Respondent acknowledged that he no longer had a bookkeeper working for him and that he had changed accountants. He indicated that he had reverted to the Simply Accounting program, rather than one designed for law firms.

The impact of the proposed sanction on the respondent

[23] The Respondent states that the impact of the proposed penalty would be to limit his practice so severely as to be tantamount to being unable to practise.

[24] The Panel believes that the proposed penalty is very restrictive and would severely limit the Respondent's ability to practise.

Need for specific or general deterrence

[25] There is a need for specific deterrence in order for the Panel and the public to be assured that this will not happen again. As indicated above, ensuring compliance with the Law Society's accounting rules is very important in order that the public may have confidence in how a lawyer handles a client's money. This Panel must consider the need to ensure the public's confidence in the integrity of the profession and give it paramountcy over the rehabilitation of the Respondent.

[26] In this case the need for specific deterrence outweighs the rehabilitation of the Respondent.

[27] The Panel is most concerned about:

(a) the nature and gravity of the conduct;

(b) the number of times the conduct occurred; and

(c) the fact that the Respondent has not acknowledged his misconduct, but would change his billing practice to "play safe."

[28] However, this Panel also considers that the disciplinary action ought not to be so restrictive or so severe as to essentially limit the Respondent's ability to practise at all.

RANGE OF PENALTIES IMPOSED IN SIMILAR CASES

[29] There are no decisions in which the facts exactly mirror the facts in this proceeding. The decisions on disciplinary action related to multiple breaches of accounting rules have resulted in sanctions that range from a reprimand (with conditions) to a fine of $10,000. The Law Society cited a number of cases related to the inappropriate withdrawal of money from trust, but none were entirely reflective of the facts in this case.

[30] The Law Society cited the case of *Law Society of BC v. Ashton*, [1991] LSDD No. 7, but that case involved the withdrawal of more money from trust than was held to the credit of a client and the lawyer's failure to make good the trust accounting shortages promptly. He was fined $1,000 and restrictions were placed on his practice.

[31] In *Law Society of BC v. Greig*, 2005 LSBC 20, the respondent failed to maintain receipt books and payment ledgers for ten years and failed to report the miscellaneous income received to Revenue Canada (now CRA) for a period of five years. The panel determined that a fine of $7,500 was appropriate. However, the Panel notes that the concerns raised in *Greig* were more serious and went on for a longer period of time than in the current case.

[32] In *Law Society of BC v. Lail*, 2012 LSBC 32, the respondent failed to deliver bills to clients prior to removal of funds from trust in 24 instances. The panel accepted the respondent's Rule 4-22 admission of professional misconduct and fined him $3,500. The panel also ordered that he not operate or act as a signatory to a trust account.

[33] In *Law Society of BC v. Liggett*, 2009 LSBC 36, the respondent failed to maintain books, accounts and records in compliance with Part 3, Division 7 of the Law Society Rules for a period of four years. His failure was systemic, and he failed to meet two "action plans" that he proposed to the Law Society to achieve compliance. The panel imposed a fine of $3,000 and a condition that required the respondent to obtain an accountant's report every six months for three years regarding his compliance with the accounting rules. The panel referred to *Law Society of BC v. Geller*, 2004 LSBC 24, and noted that "a degree of oversight for a reasonable period of time will ensure that a 'relapse does not occur' and that, if it does, it will minimize the magnitude of any failure."

DISCIPLINARY ACTION

[34] This Panel has concluded that the appropriate disciplinary action, bearing in mind all the factors listed above and a review of the previous decisions is as follows:

(a) The Respondent must pay a fine in the amount of $3,000 on or before August 31, 2015; and

(b) The Respondent is required to produce to the Law Society a report from an accountant (approved by the Law Society Compliance Audit Department) on a quarterly basis. That is to say, commencing on the

date of this decision on disciplinary action, and every three month period thereafter, the Respondent must provide the Law Society within 30 days a report that states that the Respondent's general account and trust account are in compliance with the Law Society accounting rules. This condition will remain in place until the Practice Standards Committee determines it is no longer necessary.

COSTS

[35] The Law Society has provided a bill of costs in accordance with the tariff in the amount of $29,736.53. The Respondent received the bill of costs the day before the hearing.

[36] The Respondent requested an adjournment in order that he might further review and address the issues of costs. The Respondent did indicate he had reviewed case material regarding costs a month in advance of the hearing. The Respondent agreed that he was aware of the tariff and could provide no indication as to why he would have been surprised by the bill of costs presented by the Law Society. The Panel did not agree to adjourn the hearing generally.

[37] The Law Society has advised that the majority of the items in the bill (totalling $19,500) are simply set out in the tariff. Approximately $4,500 represents court reporter fees. Thus, approximately $24,000 is non-discretionary. For the majority of the remainder of the items, the Law Society has suggested the lower end of the range.

[38] The Respondent took no issue with the individual items of the bill of costs. However, he submitted that costs must be reasonable and cited a number of cases in which costs were considerably lower than $29,000. However, all the cases cited were prior to 2012, the year in which the tariff was adopted.

[39] The Respondent raised the issue that costs should not provide a full indemnity to a party since the tariff is not designed to provide full indemnity, merely reasonable recovery of costs.

[40] However, there is no indication that the proposed costs provide the Law Society with full indemnity.

[41] The Respondent stated that the costs were a major financial burden and a financial problem for him. However, he failed to provide the Panel with any information on the finances of his firm or his personal finances. The Panel is unable to judge the impact of the costs without that information.

[42] The Panel has concluded that the bill of costs of the Law Society is reasonable and the Respondent is ordered to pay costs of $29,200. However, the Respondent will be given one year from the date of this decision to make full payment.